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Supreme Court, U.S.
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No. 07-547

IN THE
Supreme Court of the United States

OSCAR LOPEZ,

Petitioner,

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated: October 22, 2007

QUESTION PRESENTED

This case presents a recurring question in suits against the United States in which the prevailing plaintiff seeks to recover attorneys fees under the Equal Access to Justice Act ("EAJA"): whether in adjusting the nationwide hourly-rate cap (now $125) to reflect "an increase in the cost of living," district courts must use the Consumer Price Index for All Urban Consumers ("CPI-U") in their calculations.

The Fifth Circuit has answered the question "no," holding that district courts must instead adjust the rate cap based on factors unique to "the locale" in which the district court sits. This decision conflicts with those of other federal courts, including the Third, Fourth, and Ninth Circuits, as well as the Federal Court of Claims. All of them have held that the CPI-U should be controlling. Petitioner contends that this is the correct interpretation of the EAJA.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Oscar Lopez was the appellant in the Court of Appeals and the prevailing plaintiff in the district court.

Respondent Michael J. Astrue, Commissioner of Social Security, was the appellee in the Court of Appeals and the defendant in the district court.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Oscar Lopez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The recommendation of the magistrate judge, which is unpublished, is reprinted in Appendix D.

The magistrate's order on reconsideration, which is unpublished, is reprinted in Appendix C.

The district court's order overruling Plaintiff's objection to the magistrate's recommendation, which is unpublished, is reprinted as Appendix B.

The Fifth Circuit's opinion affirming the EAJA award, which is unpublished, is reprinted as Appendix A. It is reported at 236 Fed.Appx. 106, 2007 WL 2114623, and 121 Soc.Sec.Rep.Serv. 207.

JURISDICTION

The Fifth Circuit issued its opinion on July 24, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2412(d)(1)(A) of Title 28 of the United States Code provides, in pertinent part:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ...

Section 2412(d)(2)(A) of Title 28 of the United States Code provides, in pertinent part:

> "fees and other expenses" includes ... reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates of the kind and quality of the services furnished, except that ... (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);"

STATEMENT OF THE CASE

After prevailing on his disability claim against the Social Security Administration, Mr. Lopez moved to

recover his attorney fees under the EAJA. He sought to be reimbursed for 54.9 hours of work by his attorneys at an hourly rate of $156.25. The government conceded that a fee award under the EAJA was appropriate, but objected to the number of hours. The magistrate, however, determined that all of Lopez's requested hours were reasonable except .25 hours, which he eliminated. Neither party complained on appeal about the number of hours awarded.

Because the market rates for Lopez's lawyers were greatly in excess of EAJA's national rate cap of $125 per hour, a point not disputed below, Lopez asked the district court to raise the rate cap to $156.25 due to "an increase in the cost of living." 28 U.S.C. § 2412(d)(2(A)(ii). Lopez did not argue that a "special factor ... justifies a higher fee." *Id.*

Lopez's only inflation evidence consisted of U.S. government data comparing the national Consumer Price Index for All Urban Consumers (the CPI-U) when the national rate ceiling was raised to $125 (March, 1996)[1] to the CPI-U at the time Plaintiff's civil action was commenced. The supporting data were taken from the website of the Bureau of Labor Statistics (BLS). Lopez asked the district court to raise the cap accordingly.

The government put forth no inflation evidence of its own. Nor did it counter Lopez's assertion that the change in the national CPI-U is the proper way to calculate "an increase in the cost of living." In fact, the government did not oppose the hourly-rate re-

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[1] *See Mannino v. West*, 12 Vet.App. 242, 243 (1999) *citing* Pub. L. No. 104-121, §232, 110 Stat. 841, 863 (1996) (codified at 28 U.S.C. §2412(d)(2)(A).

quest in any fashion. This may be due to the fact that the inflation-adjustment methodology Lopez used is the same one the Social Security Administration has successfully advocated in other jurisdictions. *See, e.g., Quint v. Barnhart*, 2006 WL 1495004 (D.Me.) (unpublished) ("I agree with the [C]ommissioner ... that cost-of-living adjustments to attorney fees awarded pursuant to the EAJA should be made with reference to a national index, specifically, the CPI-U-ALL").

In any event, the magistrate recommended a reduction in the requested hourly rate from $156.25 to $140.00 per hour, giving the following explanation:

> [T]his court finds that the appropriate rate in this case in the Abilene Division of the Northern District of Texas "to ensure adequate representation for those who need it and to minimize the costs of the representation to the taxpayers" pursuant to *Baker* is currently $140. This is an increase in the uniform rate that the court has previously determined to be reasonable and appropriate in the San Angelo and Abilene Divisions. The court finds that a further increase in the rate at this time is not necessary to ensure an adequate source of representation.

App. D5-D6.

The City of Abilene, which lies approximately 180 miles due west of Dallas/Fort Worth, has a population of 115,930.[2] Lopez's lawyers both live and work in Dallas. The Bureau of Labor Statistics publishes no cost-of-living data for Abilene. Nor does the magistrate's order cite any cost-of-living statistic, point to

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[2] *See* City of Abilene website, http://www.abilenetx.com/About/index.htm

any evidence relevant to inflation, or offer any further explanation for the $140 figure, which he seems to have chosen arbitrarily.

The magistrate's reference to "*Baker*" denotes *Baker v. Bowen*, 839 F.2d 1075 (5th Cir. 1988), the controlling Fifth Circuit authority on the question of how hourly rates are to be determined under EAJA. *Baker* acknowledges that the rate should usually be increased "if there is a significant difference in the cost of living since 1981 in a particular *locale* that would justify an increase in the fee," 839 F.2d at 1084 (emphasis added), but it endorses no cost-of-living index and makes clear that no index need be followed.

Plaintiff objected to the magistrate's hourly-rate finding. He argued that, given that it was undisputed that the market rate for Lopez's lawyers was far higher than the EAJA's rate cap adjusted for inflation, and given that the magistrate had determined that "an increase in the cost of living" justified a award of above the cap, his failure to award a full inflation adjustment commensurate with the change in the national CPI-U was contrary to § 2412(d)(2)(A). Lopez also pointed out that the $140 rate had no evidentiary support, and that the magistrate's order did not explain how this figure was derived, and pointed to no supporting data that would permit meaningful appellate review.

The district judge overruled the objection and adopted the magistrate's recommendation. App. B. He noted that he was bound to follow *Baker*. He also pointed out that the Fifth Circuit had recently reaffirmed it in a case that originated in his court, approving an even lower hourly rate. App. B2 *citing Yoes v. Barnhart*, 467 F.3d 426 (5th Cir. 2006).

Lopez appealed to the Fifth Circuit, which affirmed. Its opinion is very short, doing little more than reiterating the rule of *Baker* and noting that the Fifth Circuit recently reaffirmed *Baker* in *Yoes*.

Lopez petitions for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN MEANING OF THE EAJA, WITH DECISIONS OF THIS COURT, AND WITH DECISIONS OF AT LEAST FOUR OTHER CIRCUITS AND THE FEDERAL COURT OF CLAIMS.

Section 2412(d)(2)(A)(ii) imposes a uniform $125 cap on hourly rates throughout the nation. The EAJA does not define "cost of living," but the common meaning is well known. "Cost of living is usually measured by the Consumer Price Index (CPI)."[3] The CPI is "[w]idely used to measure changes in [the] cost of maintaining [a] given standard of living."[4] Although there are several CPI statistics, "the media usually focus on the broadest, most comprehensive one: *the Consumer Price Index for All Urban Consumers (CPI-U) for the U.S. City Average for All Items,*

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[3] BLACK'S LAW DICTIONARY (5th Ed. 1979) (defining of "Cost of living clause").

[4] BLACK'S LAW DICTIONARY (5th Ed. 1979) (defining "Consumer Price Index").

"From the time subsection 2412(d) first became effective on October 1, 1981, almost every court that has applied this subsection has held, albeit without debate on the specific issue, that "cost of living" has this ordinary meaning and is properly measured by the Consumer Price Index." *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992) (canvassing cases).

1982-84=100."[5] This is the "Official CPI."[6] The CPI-U "represents about 87 percent of the total U.S. population and is based on the expenditures of all families living in urban areas."[7] Although the BLS also gathers data for several regions and 26 metropolitan areas, it does so less frequently and using smaller samples.[8] The Bureau "strongly recommends that users adopt the U.S. City Average CPI for use in [price-change] escalator clauses."[9] This is because "metropolitan area and other sub-components of the national indexes (regions, size-classes) often exhibit greater volatility than the national index."[10]

A. The Existence of a Circuit Conflict is Judicially Recognized.

"[C]ourts confronting this issue [of quantifying "an increase in the cost of the living" under EAJA] have split on the question whether usage of national, regional or local CPI-U charts is appropriate." *Quint v. Barnhart*, 2006 WL 1495004 (D.Me.) *citing Jawad v. Barnhart*, 370 F.Supp.2d 1077, 1083-85 (S.D.Cal. 2005) (canvassing case law); *see also Mannino v. West*, 12 Vet.App. 242, 243 (Vet.App. 1999) (same).

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[5] Bureau of Labor Statistics, FAQ No. 13, http://www.bls gov/cpi/cpifaq.htm.

[6] *Id*

[7] *Id.*

[8] Bureau of Labor Statistics, "How to Use the Consumer Price Index for Escalation," http://www.bls.gov/cpi/cpi1998d.htm. (Last Modified Date: October 16, 2001)

[9] Bureau of Labor Statistics, "How To Use The Consumer Price Index For Escalation," http://www.bls.gov/cpi/cpi1998d.htm. (Last Modified Date: October 16, 2001)

[10] *Id.*

The Fifth Circuit in *Yoes* acknowledges the existence of a circuit conflict, but on the ostensible basis that "the Eighth Circuit's reasoning applies in our Circuit with less force," declines "to adopt their rule." *See Yoes*, 467 F.3d at 427. The Eighth Circuit rule, as well as those of other circuits and jurisdictions, are set forth in more detail below.

B. The Fifth Circuit's Locale-Based Approach, Requiring District Courts To "Minimize The Costs of Representation to the Taxpayers," Conflicts With This Court's Decisions in *INS v. Jean*.

In *Baker*, the Fifth Circuit acknowledges that an hourly rate above the cap should "usually" be awarded "if there is a significant difference in the cost of living since 1981 in a particular *locale* that would justify an increase in the fee," 839 F.2d at 1084 (emphasis added). No particular inflation index need be followed, however. *Id.* Instead the district court must conduct an individualized locale-based inquiry in which inflation is simply one factor. The resulting rate must serve what the Fifth Circuit describes as EAJA's "dual purpose: to ensure adequate representation for those who need it and to *minimize* the costs of this representation to taxpayers." 839 F.2d at 1083 (emphasis added). The rate so determined is applied uniformly throughout the locale to all EAJA cases of the same type (e.g., Social Security cases), without regard to whether a particular lawyer's market rate is lower or higher. The choice of hourly-rate "is within the discretion of the district court."

"Minimize" is a strong word meaning "to decrease to the least possible amount."[11] The Fifth Circuit's insistence that "minimiz[ing] the costs of the representation to the taxpayers" is not only a purpose of the EAJA, but one that district courts *must* consider in determining the size of cost-of-living adjustments has no basis in the statute's language. It is also contrary to this Court's unanimous decision in *INS v. Jean*, 496 U.S. 154 (1990), describing EAJA's purpose to be roughly the opposite:

> "The Government's general interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights and "curbing excessive regulation and the unreasonable exercise of Government authority."

Jean, 496 U.S. at 164-65. *Jean* teaches that what is at stake in a case covered by the EAJA is not one individual's injustice, but the validity of the underlying policy, regulation, or ruling being challenged. Congress enacted EAJA to encourage thorough "adversarial" testing in court of such actions by federal agencies, particularly when brought by claimants "for whom cost may be a deterrent to vindicating their rights." H.R.Rep. No. 96-1418, p. 10 (1980), *as quoted in Jean*, 496 U.S. at 165, n. 14.

Inflation adjustments are crucial to furthering EAJA's true purpose, described in *Jean*. The rate cap

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[11] Minimize: "1. to reduce to a minimum; decrease to the least possible amount, degree, etc." WEBSTER'S NEW WORLD COLLEGE DICTIONARY (3rd Ed. 1997).

of $125, established 11 years ago, is low.[12] Because this Court's decision in *Pierce v. Underwood*, 487 U.S. 552 (1988) restricts the "special factor" method for raising the cap to the point that it is essentially no longer available, inflation adjustments are now particularly critical. In *Pierce*, this Court twice refers to the "$75 cap (adjusted for inflation)," however, leading one court to conclude, "[t]he Supreme Court has implied [in *Pierce*] that applying a cost-of-living adjustment under the EAJA is next to automatic." *Meyer v. Sullivan*, 958 F.2d 1029, 1035, at n. 9 (11th Cir. 1992). And, of course, without inflation adjustments, the incentive to challenge suspect government action grows weaker with each passing day.

The *Baker* inflation-adjustment approach, however, gives district court's almost unlimited discretion to make small inflation adjustments or even to deny them altogether. In the decision below, the Fifth Circuit determined that the district court may adjust the cap without giving a specific fact-based rationale, even in contravention of the only cost-of-living evidence in the record and in the absence of government opposition. The *Baker* rule has also led the Fifth Circuit to conclude that, so long as the district court's chosen rate is applied uniformly within its locale, a district court is free to decline to grant *any* cost-of-living adjustment. *See Hall v. Shalala*, 50 F.3d 367 (5th Cir. 1995) (affirming the decision to deny a cost-of-living increase, but "invit[ing] the district judges of the Eastern District of Louisiana to address any lack of uniformity in the district and to address the issue

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[12] $125 is at the low end of the range of rates charged for legal assistants by major Washington D.C. firms, who charge their top paralegals out at rates in excess of $250 per hour.

with a view toward developing the required uniformity.").[13]

C. The Fee Applications Of Veterans Are Also Subjected To A Locale-Based Inflation Adjustment.

The EAJA applications of military veterans are also subject to a local-inflation rule. Although the United States Court of Veterans Appeals[14] once "adopted the CPI-U" approach,[15] it has recently abandoned it in favor of "holding that in determining attorney fees under the EAJA, the local CPI will be applied where one is available or, where not, the regional CPI will be applied, to calculate the rate of inflation over the statutory rate." *Mannino v. West*, 12 Vet.App. 242, 243 (1999). Acknowledging that "there is a split of authority on this question," *id.*, the court concluded that "the national policy underlying the EAJA ... is better served by tying the attorney-fee rate paid more closely to the actual CPI increase where the attorney works." 12 Vet. App. at 243.

The Fifth Circuit's decision in *Baker* is among those *Mannino* purports to follow. *See* 12 Vet.App. at

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[13] Why hourly-rate uniformity is essential inside a city or locale, but not beyond it, is not something the Fifth Circuit has explained. It is a particularly curious matter in Social Security cases, which tend to be handled by lawyers working in multiple cities, districts, and regions. (Lopez's lawyers, for example, live and work in Dallas).

[14] It is now the Court of Veterans Appeals for Veterans Claims. *See Bates v. Nicholson*, 398 F.3d 1355, 1364 (Fed.Cir. 2005).

[15] *Elcyzyn v. Brown*, 7 Vet.App. 170 (1994). The precise question in Elcyzyn was whether the general CPI-U or "the personal services CPI, which includes legal services" should be used. 7 Vet. App. at 179-81.

243. But, in contrast to the Fifth Circuit's approach, the rule in the Veterans' court is both clear and non-discretionary: it insists on "tying" hourly rate to an inflation index and clearly instructs on which one should be used.

D. In Holding That Inflation Adjustments Need Not Be Tied to Any Inflation Index And Must Be Focused On The "Locale," The Fifth Circuit's Decision Conflicts With Those of at Least Four Other Circuits and the Federal Court of Claims.

At least three circuits – the Third, Fourth, and Ninth, together with The Federal Court of Claims – adjust the cap for inflation as measured by the CPI-U. Additionally, the Eighth Circuit, although it does not specifically identify the CPI-U, makes clear that cap adjustments in that region must at least be uniform throughout its multi-state region. All of these cases are in direct conflict with the Fifth Circuit.

The Third Circuit, in *Dewalt v. Sullivan*, 963 F.2d 27, 30 (3rd Cir. 1992), relying in part on this Court's decision in *Pierce*, holds:

> "We conclude that, in awarding fees pursuant to § 2412(d) of the EAJA, the court is required to apply the statutory cap, as affected by general inflation since 1981, and that the CPI-ALL index, rather than the personal-services component of that index, provides an appropriate measure of such inflation."

The "CPI-All" can only be an reference to the "Consumer Price Index for All Urban Consumers for the U.S. City Average for All Items," the most comprehensive measure BLS publishes and the commonly

understood "general inflation" measure more typically abbreviated "CPI-U."

The Fourth Circuit follows a similar rule. In *Sullivan v. Sullivan*, 958 F.2d 574 (4th Cir. 1992), the government "argued that the court was statutorily limited to the use of the CPI for All Urban Consumers (CPI-U)" if it wished to award attorneys fees in excess of the $75 per hour ceiling. 958 F.2d at 575. Purporting to rely on this Court's decision in *Pierce*, the Court sided with the Secretary, stating:

> Accordingly, we hold that section 2412(d)(2)(A) does not permit an attorney fee award above the $75 statutory ceiling based upon increases in the market rate for legal services. Limiting awards to the $75 statutory ceiling, adjusted only for general cost-of-living increases in accordance with the statutory text, effectuates Congress' intent that attorney fees be fixed at $75 per hour in 1981 dollars regardless of the prevailing market rates, yet ensures that the maximum rate will continue to provide adequate compensation notwithstanding inflation.

958 F.2d at 578.

The Eighth Circuit, although it has not endorsed the CPI-U specifically, has declared that "[u]nder ordinary circumstances ... [p]roper proof of an increase in [the] cost of living should result in consistent hourly fee awards in each case, rather than producing disparate fee awards from each court within the district or from different districts within this circuit." *Johnson v. Sullivan*, 919 F.2d 503 (8th Cir. 1990). Thus, EAJA applicants in the Eighth Circuit are free to use either a nationally-focused CPI or a regional variant that applies uniformly to Arkansas, Iowa,

Minnesota, Missouri, Nebraska, and South Dakota. 919 F.2d at 504. This conflicts with the Fifth Circuit's discretionary "locale"-based approach, as the Fifth Circuit itself concluded in *Yoes*, 467 F.3d at 427.

The Ninth Circuit concludes in *Thangaraja v. Gonzales*, 428 F.3d 870 (9th Cir. 2005):

> Appropriate cost-of-living increases are calculated by multiplying the $125 statutory rate by the annual average consumer price index figure for all urban consumers ("CPI-U") for the years in which counsel's work was performed, and then dividing by the CPI-U figure for March 1996, the effective date of EAJA's $125 statutory rate [cap].

The Federal Court of Claims has also repeatedly prescribed the CPI-U as the proper, usual method for raising EAJA's rate cap. *See, e.g., CEMS, Inc. v. United States*, 65 Fed.Cl. 473, 485-486 (2005) ("District courts generally determine the COLA by multiplying the basic EAJA rate of $125 by the current consumer price index for urban consumers (CPI-U), and then dividing the product by 155.7, the CPI-U for March 1996 when the cap was imposed."); *Gonzales v. United States*, 44 Fed.Cl. 764, 770-71 (1999) ("The $125 cap became effective in March, 1996, and the cost of living at that time, as measured by the Consumer Price Index for All Urban Consumers ("CPI-U"), is therefore the proper baseline for determining any increase in the cost of living.")

CONCLUSION

Choosing the appropriate inflation index for use in adjusting the rate cap for "an increase in the cost of living" is an "arcane but important matter." *Quint v.*

Barnhart, 2006 WL 1495004 (D.Me.). It has generated a distressingly large number of fee disputes and much judicial wheel-spinning. This hardly squares with this Court's admonition that fee requests "should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The judicial discord is particularly lamentable with respect to the EAJA, because it "applies to a wide range of awards in which the cost of litigating fee disputes would equal or exceed the cost of litigating the merits of the claim." *INS v. Jean*, 496 U.S. 154, 163-64 (1990). In order to provide the clarity and simplicity that is needed if EAJA is to work as intended, this Court should grant certiorari to resolve the circuit conflict over the proper interpretation of Section 2412(d)(2)(A)(ii).

Respectfully submitted,

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Dated: October 22, 2007

APPENDIX A

United States Court of Appeals
Fifth Circuit
FILED
July 24, 2007
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10048
Summary Calendar

OSCAR LOPEZ,
Plaintiff-Appellant,

versus

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas, Abilene
No. 1:05-CV-00137

Before JONES, Chief Judge, and REAVLEY and PRADO, Circuit Judges.
PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appellant Lopez challenges the district court's calculation of his award for attorney's fees under the Equal Access to Justice Act. We affirm.

The district court awarded attorney's fees at the rate of $140.00 per hour, a rate the Magistrate Judge determined was reasonable and appropriate in the Abilene Division to ensure adequate representation for those who need it, as required by 28 U.S.C. § 2412(d)(2)(A)(ii). Appellants contend that the court abused its discretion because all attorneys should be reimbursed using the statutory cap of $125.00 per hour, adjusted by the national Consumer Price Index for All Urban Customers ("CPI-U"). This method would produce a fee of $156.25 per hour.

This court rejected a similar argument in *Yoes v. Barnhart*, 467 F.3d 426 (5th Cir. 2006), concluding that rate uniformity is not required even across a single district: "[R]ate disparities between courts serving two different markets is more than reasonable; indeed, it is expressly contemplated by the Act itself." *Id.* at 427. The district court did not err by refusing to apply the CPI-U, and the rate awarded here is more generous than that in *Yoes*.

Under the abuse of discretion standard, *see Baker v. Bowen*, 839 F.2d 1075, 1082 (5th Cir. 1988), we cannot say that $140.00 per hour, $15.00 per hour higher than the statutory cap, does not adequately provide for representation in Abilene. Accordingly, the district court's order awarding attorney's fees and costs is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

OSCAR LOPEZ,	§	
Plaintiff,	§	
v.	§	
Jo Anne B. Barnhart,	§	Civil Action No.
Commissioner of Social	§	1:05-CV-137-C
Security	§	ECF
Defendant.	§	

ORDER

COMES NOW BEFORE THIS COURT Plaintiff's Motion for District Judge's Assistance in Perfecting Appellate Jurisdiction, filed with this Court on November 17,2006. Plaintiff appears to be requesting that this Court make a ruling on Plaintiff's Objection to Hourly Rate Found by Magistrate Judge, filed November 14, 2006. This Court had construed Plaintiff's Objection as a motion for relief. Thus, this Court referred Plaintiffs Objection to the Magistrate Judge on November 16,2006. The Magistrate Judge treated Plaintiffs Objection to Hourly Rate as a motion for relief from judgment under Rule 60(b) and found that Plaintiff was filing such objection "[t]o the extent that formal objection is necessary to preserve error." (Mag. Order dated Nov. 16,2006 (quoting Plaintiffs Mot.)). Plaintiff then filed his Motion for District Judge's Assistance, arguing that this Court was required to rule upon his Objection rather than refer it to the Magis-

trate Judge as a motion for relief from judgment. This Court will now rule on Plaintiffs Objection.

Plaintiff specifically objects to the hourly rate for attorney's fees which the Magistrate Judge found was appropriate in this matter. Plaintiff argued that pursuant to *Baker v. Bowen*, 829 F.2d 1075, 1084 (5th Cir. 1988), the appropriate hourly fee is the same fee applicable to the Dallas Division. As succinctly put by the Magistrate Judge's November 16,2006 Order, "[t]his exact issue was recently addressed by the Fifth Circuit, examining an EAJA fee award out of the Abilene and San Angelo Divisions of the Northern District of Texas at the rate of $132.50 per hour." (Mag. Order dated Nov. 16,2006 (*citing Yoes v. Barnhart*, 467 F.3d 426,427 (5th Cir. 2006). As already noted by the Magistrate Judge in his Order, "[t]he Fifth Circuit found that this court's determination of the appropriate hourly rate, which reflected the location of the court, did not constitute an abuse of discretion, noting *Baker* 'did not mandate rate uniformity across the entire federal district however.'" *Id.*

Here, the Magistrate Judge determined that $140.00 per hour was reasonable and appropriate in the Abilene Division to ensure adequate representation for those who need it and to minimize the costs of the representation to taxpayers. (Mag. Orders dated Nov. 1, 2006 and Nov. 16, 2006.) This determination was based upon the Fifth Circuit's reasoning in *Yoes*, 467 F.3d at 427, and upon the Magistrate Judge's own knowledge. *Id.* This Court carefully reviewed the record in this case and the Magistrate Judge's well-reasoned and thorough analysis contained in the November 1,2006 Order and finds no error. The Fifth Circuit has spoken on this precise issue and Plaintiffs

arguments are foreclosed.[1] Plaintiffs Objection is OVERRULED.

SO ORDERED this 5th day of December, 2006. *

[signature]

SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

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[1] In *Yoes v. Barnhart*, 467 F.3d 426,427 (5th Cir. 2006), the Fifth Circuit found that $132.50 per hour in attorney's fees for San Angelo and Abilene adequately provided for representation. Therefore, the Magistrate Judge's determination that $140.00 per hour ($7.50 more) would also necessarily be adequate.

APPENDIX C

OSCAR LOPEZ,	§	
Plaintiff,	§	
v.	§	
Jo Anne B. Barnhart,	§	Civil Action No.
Commissioner of Social	§	1:05-CV-137-C
Security	§	ECF
Defendant.	§	

ORDER ON PLAINTIFF'S MOTION FOR RELIEF FROM ORDER

THIS MATTER is before the court upon Plaintiffs Objection to Hourly Rate Found by Magistrate Judge filed November 14,2006 (Doc. 41), which this court treats as a motion for relief from judgment or order under Fed. R. Civ. P. 60(b). This motion was referred to the United States Magistrate Judge on November 16,2006 (Doc. 42). In his motion Plaintiff argues that the United States Magistrate Judge erred in determining the appropriate hourly rate of attorneys fees awarded under the Equal Access to Justice Act ("EAJA").

Plaintiff indicates that he files such objection "[t]o the extent that formal objection is necessary to preserve error." The fee application was referred to the United States Magistrate Judge for determination, as a non-dispositive matter. Plaintiffs appeal of this determination would be directly to the United States Court of Appeals for the Fifth Circuit, rather than by objection to the United States District Judge. Therefore, the court treats this as a motion for relief from judgment or order.

Pursuant to Fed. R. Civ. P. 60(b), the court may relieve a party from a final judgment, order, or proceeding (1) for mistake, inadvertence, surprise, or excusable neglect; (2) for newly discovered evidence which could not have been discovered by due diligence; (3) for fraud; (4) because the judgment is void; (5) because the judgment has been satisfied, released, or discharged; or (6) for any other reason justifying relief from the operation of the judgment. Here, Plaintiff asks that the court reconsider the attorney fee award, arguing that the court applied incorrect law in making the award.

Plaintiff specifically objects to the hourly fee which the court found was appropriate in this matter. Plaintiff argues that pursuant to *Baker v. Bowen*, 839 F.2d 1075, 1084 (5th Cir. 1988), the appropriate hourly fee is that which is applicable to the Dallas Division. This exact issue was recently addressed by the Fifth Circuit, examining an EAJA fee award out of the Abilene and San Angelo Divisions of the Northern District of Texas at the rate of $132.50 per hour. *See Yoes v. Barnhart*, 2006 U.S. App. LEXIS 25007, 2-3 (5th Cir. October 5,2006). The Fifth Circuit found that this court's determination of the appropriate hourly rate, which reflected the location of the court, did not constitute an abuse of discretion, noting that *Baker* "did not mandate rate uniformity across the entire federal district however." *Id.* The Fifth Circuit further opined that "[a]lthough rate fluctuations among federal courts serving the same city are arbitrary, the same rate disparities between courts serving two different markets is more than reasonable; indeed, it is expressly contemplated by the Act itself." *Id.* While this is an unpublished opin-

ion, *Yoes* remains persuasive and instructive because it deals with the specific issue raised by Plaintiff in his objection.

Plaintiff also argues that there is no evidence in the record to support the hourly rate finding. However, the court found that "the appropriate rate in this case in the Abilene Division of the Northern District of Texas 'to ensure adequate representation for those who need it and to minimize the costs of the representation to the taxpayers" pursuant to Baker is currently $140.00 per hour.'" This is based on the court's own knowledge, and was also upheld by the Fifth Circuit in *Yoes. Yoes,* 2006 U.S. App. LEXIS 25007 at *4. Having carefully considered Plaintiffs objection, the court nevertheless concludes that the hourly rate awarded was appropriate. Therefore, Plaintiff is not entitled to relief from the Order on Plaintiffs Motions for Attorneys' Fees entered on November 1,2006.

DATED this 16th day of November, 2006.

[signature]

PHILIP R. LANE
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

OSCAR LOPEZ,	§	
Plaintiff,	§	
v.	§	
Jo Anne B. Barnhart,	§	Civil Action No.
Commissioner of Social	§	1:05-CV-137-C
Security	§	ECF
Defendant.	§	

ORDER ON PLAINTIFF'S MOTIONS FOR ATTORNEYS' FEES

THIS MATTER is before the court upon Plaintiff's Application for Attorney Fees Under the Equal Access to Justice Act ("EAJA") filed September 22,2006 (Doc. 31), Plaintiff's Motion to Enlarge Time to File a Motion for Attorneys' Fees Under Section 406(b) of the Social Security Act filed September 6,2006 (Doc. 28), and Plaintiffs Motion for Reconsideration and/or Relief from Order Denying Plaintiffs Motion to Enlarge Time to Seek Attorneys' Fees Under Section 406(b) of the Social Security act filed October 12, 2006 (Doc. 38). Defendant filed her response to the application for attorney fees under the EAJA on September 27,2006 (Doc. 33), and Plaintiff filed his reply on October 10, 2006 (Doc. 37). The United States District Judge referred these motions to the United States Magistrate Judge on September 25,2006 (Doc. 32), and on October 13, 2006 (Doc. 39), for a hearing, if necessary, and for determination.

In his application Plaintiff seeks an award of attorneys fees pursuant to the EAJA for 54.9 hours at the rate of not less than $156.25 per hour, for a subtotal of $8,578.12, plus court costs in the amount of $250.00, for a total amount of $8,828.12.

U ıder the Equal Access to Justice Act (the "EAJA"), a party in a civil suit brought by or against the United States is entitled to recover attorney's fees from the United States if four requirements are met: 1) the party is the prevailing party, 2) the party files a timely fee application, 3) the position of the government was not substantially justified, and 4) no special circumstances make an award unjust. 28 U.S.C. § 2412(d)(l)(A)-(B). Defendant does not oppose an award of attorney's fees to Plaintiff in this case but argues that the claim for fees is excessive and should be reduced.

The Defendant argues that the 54.9 hours requested is excessive, noting that of that total, 46.9 hours was spent on drafting Plaintiffs opening brief. The Defendant further argues that the hours submitted included work which did not require an attorney's expertise, including 0.30 hours "for supervising of filing of federal complaint" and "for supervising service of summons and Complaint to Defendants." Defendant argues that the 2.25 hours for reviewing the Appeals Council decision is not compensable, as Plaintiff's complaint was not filed until July 19,2005. Defendant argues that the 0.45 hours claimed for requesting extensions of time would defeat the purpose of the EAJA.

In his reply, Plaintiff argues that the number of hours expended was reasonable because his case was not "non-complex." Plaintiff notes that the results

achieved demonstrate the reasonableness of the fee as well as the high stakes to Plaintiff (as his insured status had expired before the ALJ issued his decision), his transcript was 479 pages in length, and his brief was "more detailed than usual" and involved at least eight discreet and potentially reversible errors, including two unusual legal issues. Plaintiff argues that the 2.25 hours spent studying and reviewing the Appeals Council decision was reasonable. Plaintiff asked for an additional 4.8 hours of fees at the rate of $156.25 for replying to the Defendant's response.

A. Appropriate Rate for Attorney's Fees Award

Plaintiff asks for attorney's fees computed at the rate of $156.25 per hour. For the computation, Plaintiff used the data published by the U.S. Bureau of Labor Statistics for the consumer price index (the "CPI") in the Dallas-Fort Worth area for Urban Wage Earners and Clerical Workers. To determine the increase in the cost of living, Plaintiff compares the CPI for April 1996 with the average of the CPIs for July 2005 and July 2006. The Supreme Court recognized in *Pierce v. Underwood*, 487 U.S. 552, 571-74 (1988) that any adjustment made under the EAJA as the result of an increase in the cost of living is made to the statutory cap. The Court, in reviewing the special factors provision of the EAJA, excluded the cost of living provision from its review and referred to any cost of living adjustment, separately, as the '$ [125] cap (adjusted for inflation)." 487 U.S. at 571-74. The Fifth Circuit has also held that an adjustment for inflation is appropriately applied to the rate of the statutory cap. *Hall v. Shalala*, 50 F.3d 367, 370 (5th Cir. 1995). Thus, upon the receipt of proper proof of an increase

in the cost of living, the court should make an appropriate adjustment in the statutory cap.

The EAJA does not specify any particular method or any particular data to use for computing the increase in the cost of living. This court has previously determined, however, that the most appropriate CPI data for the computation is data that is most applicable to the area in which the court is located.

The statutory fee cap itself, of course, applies universally. One could thereby argue that cost of living adjustments should be made using data that applies to the nation as a whole. On the other hand, the EAJA provides that fees "shall be based upon prevailing market rates for the kind and quality of the services furnished . . . ." 28 U.S.C. 6 2412(d)(2)(A). The Fifth Circuit in discussing the cost of living factor refers to "the cost of living . . . in a particular locale" and "the cost of living index for the geographical area." *Baker v. Bowen*, 839 F.2d 1075, 1084 (5th Cir. 1988). The Fifth Circuit further stated in *Baker* that it is clear that the cost of living affects each litigant within the Dallas Division to the same degree. This factor requires a uniform determination in order to avoid a multiplicity of conflicting views among the Dallas courts. *Id.* at 1083. As to cost of living increases, the Fifth Circuit instructed the Dallas courts to determine a uniform rate that would be applied in all fee awards in the Dallas Division until uniformly changed by a later court order. *Id.* at 1085. The references to the "prevailing market," "a particular locale," and "the geographical area," and the requirement in *Baker* for uniform treatment of adjustments to the cap for cost of living increases in the Dallas Division, when considered together, seem to require that cost

of living adjustments be based on the data for only one location. The only data that would provide the required uniformity in *Baker* was the data applicable to the Dallas area. The same is true for the Abilene Division or any other area; uniform results in adjusting the cap in a specified area can only be obtained from data covering that area, irrespective of where an attorney lives or has his or her primary practice.

The Fifth Circuit makes it clear in *Hall* that a district court may determine that a fee based on a rate below the adjusted statutory cap "is a reasonable attorney's fee award based on the facts of a particular case." 50 F.3d at 370. It is not necessary "that attorneys' fees awards track the cost-of-living index for the geographical area.... [R]ates should be increased only to the extent necessary to ensure an adequate source of representation...." *Baker*, 839 F.2d at 1084. The EAJA "serves a dual purpose: to ensure adequate representation for those who need it and to minimize the costs of the representation to taxpayers." *Id.* at 1083. This court is required to determine the fee award in this case based on a rate within the adjusted cap that is reasonable, that minimizes the cost to the taxpayers, and that does not exceed the amount necessary to ensure an adequate source of representation in this court.

Plaintiff argues that "[t]here is no good reason for the court's desire for uniformity to be limited to a particular judicial division or city, particularly given the regional, even nationwide nature of the disability appellate practice." Pl. Appl. at 7. However, this court finds that the appropriate rate in this case in the Abilene Division of the Northern District of Texas "to ensure adequate representation for those who need it

and to minimize the costs of the representation to the taxpayers" pursuant to *Baker* is currently $140.00 per hour. This is an increase in the uniform rate that the court has previously determined to be reasonable and appropriate in the San Angelo and Abilene Divisions. The court finds that a further increase in the rate at this time is not necessary to ensure an adequate source of representation. *See id.* at 1084.

Based on Plaintiffs calculations, the court does not dispute that the rise in the cost of living may justify an adjustment to the statutory attorney's fee cap above $140.00 per hour. In its discretion, however, for the reasons stated above, the court does not approve of the Plaintiffs request for attorney's fees based on a rate above $140.00 per hour.

B. Reasonableness of the Hours Requested

Plaintiff seeks an award of attorneys fees for 54.9 hours of attorney work. Defendant argues that this does not represent a reasonable number of hours and takes issue with 3 hours of the 54.9 hours requested.

"The typical EAJA application in social security cases claims between thirty and forty hours." *Hardy v. Callahan*, No. 9:96-CV-257, 1997 WL 470355 (E.D. Tex. Aug. 11, 1997) (citing a lengthy list of cases in support). However, the court acknowledged in *Hardy* that the case was typical. The "case did not involve any particularly complex factual issues, and the medical evidence was for the most part straightforward and understandable. The legal issues were not difficult, nor were they matters of first impression." *Id.* at 9.

Plaintiff argues that this case was not "non-complex" and argues that his attorneys achieved ex-

cellent results, the stakes were high, and his transcript was 479 pages. Plaintiff also argues that his brief was more detailed than usual and addressed specific issues which were time-consuming and record-intensive.

The court has carefully reviewed the arguments of the parties, as well as the itemized list of attorney hours expended provided by the Plaintiff. While Defendant argues that the 2.25 hours expended reviewing the Appeals Council decision is not compensable, Plaintiff correctly notes that the review of this decision and consideration of the viability of this case on appeal to the United States District Court was not a part of the administrative proceeding but was necessary to prepare for the drafting of the complaint in this case. Therefore, the court finds that this amount of time was reasonable.

While Defendant argues that the 0.3 hours expended in supervising the filing of the complaint and the service of the summons was "clerical" in nature and not compensable at the attorneys fees rate, the court notes that Defendant does not suggest a more appropriate rate and the amount of time sought is reasonable for attorney oversight of such matters.

Although Defendant argues that the 46.9 hours expended to prepare the Plaintiffs brief was excessive, the court has carefully reviewed the extremely detailed, itemized description of these hours spent, as well as the brief itself, and finds that, given the specific legal issues raised in the brief and the fact and record-intensive nature of the brief and the arguments, the amount requested is not excessive. The court is also mindful of Plaintiffs assertion that his

attorney had expended additional hours which were pared from the request.

Defendant also takes issue with the 0.45 hours of fees expended in seeking two extensions of time. The court finds that the 0.25 hours expended in seeking the second extension of time are not reasonable, given that the Second Motion for Extension of Time was denied as moot. The court finds that the 0.20 hours expended in drafting the first Motion for Extension of Time and Order is, however, reasonable, particularly in light of the fact that the Defendant also sought an extension of time prior to agreeing to the remand. Therefore, 0.25 hours should be subtracted from the hours sought by Plaintiff.

Therefore, the court finds that an award of 54.65 hours of attorneys fees is reasonable at the rate noted above, which represents Plaintiffs original request for 54.9 hours, reduced by the 0.25 hours expended in seeking the second extension of time.

C. Plaintiffs Request for Additional Fees

Plaintiff seeks an award of an additional 4.8 hours expended in drafting the reply to the Defendant's response to his application for attorneys fees. The court finds that Plaintiffs request for an additional 4.8 hours of attorneys fees for litigation over the fee is well-taken and should be granted at the hourly rate discussed previously in this order.

D. Plaintiffs Request for an Award of Costs

The court further finds that Plaintiffs request for an award of costs for filing fees of $250.00 is appropriate and should be granted.

E. Plaintiffs Motion to Enlarge Time and Plaintiffs Motion for Reconsideration

In Plaintiffs motion to enlarge time to file a motion for award of attorney's fees and expenses filed September 6,2006 (Doc. 28), Plaintiff asked for additional time to file an application for attorneys' fees pursuant to Section 406(b) of the Social Security Act. The court denied this motion as moot. Plaintiff filed a motion for reconsideration on October 12,2006 (Doc. 38)' which this court treats as a motion for relief from judgment or order under Fed. R. Civ. P. 60(b). The court finds that Plaintiffs motion for reconsideration is well-taken and should be granted and that Plaintiff should be permitted an extension of time to file any application for attorney's fees pursuant to Section 406(b) of the Social Security Act as set forth below.

IT IS THEREFORE ORDERED:

1. Plaintiffs motion for reconsideration filed October 12, 2006 (Doc. 38), is **GRANTED;**

2. Plaintiffs motion to enlarge time to file a motion for award of attorney's fees and expenses filed September 6, 2006 (Doc. 28), is **GRANTED**. Plaintiff shall have thirty (30) days from the determination by the Social Security Administration of the administrative fee to which Plaintiffs counsel may be entitled to file a motion for attorney's fees under Section 406(b) of the Social Security Act with this court;

3. Plaintiffs application for attorney's fees under the EAJA filed September 22,2006 (Doc. 31), and his supplemental request for attorney's fees (as set forth in his reply) is **GRANTED IN PART**. Plaintiff is awarded 54.65 hours of attorney's fees plus an additional 4.8 hours for litigating the fee petition, for a

total of 59.45 hours of attorneys fees at the rate of $140.00 per hour or $8323.00 (or 59.45 X 140) plus $250.00 for costs, for a total of $8573.00, made payable directly to Gal Lahat, attorney for Plaintiff.

DATED this 1st day of November, 2006.

[signature]

PHILIP R. LANE

UNITED STATES MAGISTRATE JUDGE

No. 07-547

In the Supreme Court of the United States

OSCAR LOPEZ, PETITIONER

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court did not abuse its discretion under the Equal Access to Justice Act, 28 U.S.C. 2412(d), in awarding an attorney's fee of $140 per hour based on the cost of living in Abilene, Texas, instead of a higher rate based on the national Consumer Price Index for All Urban Consumers.

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In the Supreme Court of the United States

No. 07-547

OSCAR LOPEZ, PETITIONER

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the *Federal Reporter* but is reprinted in 236 Fed. Appx. 106. The opinion of the district court (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2007. The petition for a writ of certiorari was filed on October 22, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner sued the Commissioner of Social Security (Commissioner) in the Abilene Division of the United States District Court for the Northern District

of Texas. He won a remand in his action for disability benefits, and subsequently filed an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). Pet. App. D1. EAJA authorizes a court to award "fees and other expenses" to a party who prevails in litigation against the United States. 28 U.S.C. 2412(d)(1)(A). The statute defines "fees and other expenses" to include, *inter alia*, "reasonable attorney fees." 28 U.S.C. 2412(d)(2)(A).

The statute further prescribes two criteria for determining the reasonableness of attorney's fees. First, all fees must be "based upon prevailing market rates for the kind and quality of the services furnished." 28 U.S.C. 2412(d)(2)(A). Second, "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. 2412(d)(2)(A)(ii).

In his motion, petitioner sought attorney's fees at a rate of $156.25 per hour. Pet. App. D2. Although that rate exceeded EAJA's statutory cap of $125 per hour, he asserted that the higher rate should be awarded to reflect an increase in the national cost of living since EAJA's reenactment in 1996. *Id.* at D3. Petitioner sought to recover at this rate for 59.6 hours of attorney time, plus additional court costs of $250, which would have totaled $9562.50. See *id.* at D6, D8. The Commissioner did not dispute petitioner's entitlement to fees and costs, but objected to the amount. *Id.* at D2.

2. The magistrate judge approved an hourly rate of $140. The court agreed that the rise in the cost of living since 1996 justified an hourly rate above the $125 statutory maximum; justified a higher rate than the court had

previously awarded; and indeed, might even justify a rate above $140, even in the Abilene and San Angelo Divisions where the magistrate judge sits. Pet. App. D5-D6. The court further recognized that the Fifth Circuit had held in *Baker* v. *Bowen*, 839 F.2d 1075 (1988), that cost-of-living adjustments to EAJA's cap should be uniform within the Dallas Division of the Northern District of Texas. Pet. App. D4. The court explained, however, that *Baker* did not require uniform cost-of-living adjustments throughout the Northern District of Texas. *Ibid.* (The Northern District comprises seven divisions and 100 counties, extending from the Panhandle counties bordering Oklahoma to Crockett County, a few miles from the Mexican border. See 28 U.S.C. 124(a) (delineating the Northern District). Instead, the court exercised its discretion to select a "reasonable" rate that was sufficient "to ensure an adequate source of representation in this court." Pet. App. D4, D5. That rate was $140 per hour. *Id.* at D5-D6. The court held that petitioner could recover at that rate for 59.45 hours of attorney time, plus court costs, for a total award of $8573.00. *Id.* at D10. Applying the lower rate reduced petitioner's award by about $966.

3. Petitioner sought reconsideration, arguing for the application of a uniform cost-of-living standard. Pet. App. C2. The magistrate judge again declined, noting that the Fifth Circuit had recently rejected the notion of "rate uniformity across the entire federal district" and affirmed an award of $132.50 per hour (lower than the going rate in Dallas) in a case from the San Angelo Division. *Ibid.* (quoting *Yoes* v. *Barnhart*, 467 F.3d 426, 427 (5th Cir. 2006) (per curiam)). And the court reiterated that its award of $140 per hour in this case was sup-

ported by the court's own knowledge of the appropriate rate in the Abilene Division. *Id.* at C3.

4. The district court affirmed the magistrate judge's award and overruled petitioner's objection that "the appropriate hourly fee is the same fee applicable to the Dallas Division." Pet. App. B2. The district judge (who had also issued the fee award affirmed in *Yoes*) reiterated that the magistrate judge's award was reasonable, adequate, and consistent with the applicable law. *Id.* at B2-B3 & n.1.

5. The Fifth Circuit affirmed in an unpublished, per curiam disposition. The court of appeals rejected the argument that EAJA requires cost-of-living increases to be uniform nationally and confirmed that "rate uniformity is not required even across a single district," because "'[r]ate disparit[y] between courts serving two different markets is more than reasonable.'" Pet. App. A2 (quoting *Yoes*, 467 F.3d at 427). Reviewing for abuse of discretion, the court of appeals held that $140 per hour "adequately provide[d] for representation in Abilene." *Ibid.*

ARGUMENT

The court of appeals correctly concluded that the district court did not abuse its discretion by awarding attorney's fees at a locally appropriate rate of $140 per hour—an amount in excess of the presumptive statutory maximum of $125 per hour—rather than at a higher rate based on a particular index of the national cost of living. The Fifth Circuit's unpublished decision does not conflict with that of any other court of appeals. No federal appellate court has held that EAJA *requires* the use of petitioner's preferred economic statistics. Further review is not warranted.

1. Petitioner commits a threshold error by assuming that the amount of the fee award in this case turns only on the cost-of-living adjustment to EAJA's maximum hourly rate. The magistrate judge acknowledged that "the rise in the cost of living may justify an adjustment to the statutory attorney's fee *cap* above $140.00 per hour." Pet. App. D6 (emphasis added). But the magistrate judge found, and the district court agreed, that securing effective representation in the Abilene and San Angelo Divisions does not require paying the full amount of the inflation-adjusted cap. The amount of the cap is completely irrelevant when the "prevailing market rates for the kind and quality of the services furnished" are below the (adjusted) cap. 28 U.S.C. 2412(d)(2)(A). That is the case here: the magistrate judge adjusted the cap upward to account for the cost of living, but used his discretion to "determine that a fee based on a rate below the adjusted statutory cap 'is * * * reasonable.'" Pet. App. D5 (quoting *Hall* v. *Shalala*, 50 F.3d 367, 370 (5th Cir. 1995)).

The court of appeals properly affirmed that exercise of discretion. Petitioner asserts (Pet. 10) that the district court offered an inadequate "fact-based rationale" and that the "cost-of-living evidence in the record" does not support the fee award. These fact-bound contentions are incorrect and, in any event, do not warrant this Court's review.

2. Even if the question framed by the petition were properly presented, EAJA does not mandate the application of the same cost-of-living measurement in every division and every case and, instead, grants district courts discretion to make cost-of-living adjustments based on local factors. Petitioner asserts (Pet. 6-7) that EAJA's "plain meaning" requires courts to employ one

particular nationwide measure of the cost of living, the national Consumer Price Index for All Urban Consumers (CPI-U). That is incorrect. EAJA merely permits "the court" to determine whether "an increase in the cost of living * * * justifies a higher fee" in a particular case. 28 U.S.C. 2412(d)(2)(A)(ii). Nor is there any suggestion in EAJA's legislative history that cost of living must be measured in only one way. See generally H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980); S. Rep. No. 974, 96th Cong., 2d Sess. (1980); H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. (1980).

The Fifth Circuit's approach is entirely compatible with the statute's plain meaning. The court of appeals has directed that "[e]xcept in unusual circumstances, * * * if there is a significant difference in the cost of living since [EAJA's enactment] in a particular locale that would justify an increase in the fee, then an increase should be granted." *Baker* v. *Bowen*, 839 F.2d 1075, 1084 (5th Cir. 1988). And here the district court followed *Baker* and granted an attorney's fee higher than the statutory cap of $125 per hour, based in part on the increased cost of living. Pet. App. D4-D6. The Fifth Circuit and the district court have merely recognized that the cost of living often increases at different rates in different areas, and that the bar of Abilene is not invariably entitled to receive higher rates because of an increase in the price of goods in Dallas, or Detroit.

That approach is also consistent with the structure and purpose of EAJA. Indeed, the statute requires the court to make other fee determinations based on local (not national) conditions, including the "prevailing market rates for the kind and quality of the services furnished." 28 U.S.C. 2412(d)(2)(A). That local approach accords with this Court's treatment of fee awards under

42 U.S.C. 1988, under which a reasonable attorney's fee is "calculated according to the prevailing market rates *in the relevant community*." *Blum* v. *Stenson*, 465 U.S. 886, 895 (1984) (emphasis added).

3. Petitioner argues (Pet. 8-11) that the court of appeals' approach is incompatible with EAJA, as interpreted by this Court in *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990). According to petitioner, *Jean* stands for the proposition that EAJA's *only* "true purpose" is to encourage and enable parties to bring lawsuits against the government to challenge policies, regulations, or rulings, without regard to safeguarding the public fisc. This contention is both irrelevant and mistaken.

First, petitioner ascribes unjustified significance to the court of appeals' reference in *Baker* to the dual purposes of EAJA and its fee limitation. See 839 F.2d at 1093. In *Baker* the court of appeals simply held that although Congress has imposed a general cap on fee awards (to protect the public fisc), increases in the cost of living are one proper basis for awarding fees that exceed that cap. *Ibid.* And the court of appeals went on to award fees above the EAJA cap, just as in this case.

Second, in *Jean* the "narrow" issue before the Court was whether the plaintiff was entitled to a fee award *at all* for his attorney's work preparing fee applications, not what the maximum amount of such a "fees for fees" award would be. 496 U.S. at 154, 156 (explaining that the question presented "affect[ed] only [a claimant's] *eligibility* for compensation for services rendered for fee litigation *rather than the amount* that may be appropriately awarded for such services") (emphases added). To the very limited extent *Jean* addressed the size of awards, it simply emphasized that "a district court will

always retain substantial discretion in fixing the amount of an EAJA award." *Id.* at 163.

Accordingly, the Fifth Circuit's brief reference in *Baker* to EAJA's purposes creates no conflict with *Jean* or any other decision of this Court.

4. Petitioner asserts that the court of appeals' decision warrants review because it is in "direct conflict" with approaches taken by the Third, Fourth, Eighth, and Ninth Circuits. Pet. 12.[1] That is incorrect. No court of appeals has held that EAJA requires reference to national inflation data; indeed, one of the decisions that petitioner cites actually relied on *local* cost-of-living statistics. See *Dewalt* v. *Sullivan*, 963 F.2d 27, 28, 30 (3d Cir. 1992). The other cases cited by petitioner at most support the notion that the national CPI-U figure may be *a* permissible measurement of the cost of living; none of them supports the proposition that a district court abuses its discretion under EAJA by *not* employing the CPI-U, as petitioner argues. Petitioner therefore fails to identify any disagreement between courts of appeals that calls for this Court's review.

a. Three of the cases upon which petitioner relies addressed questions unrelated to whether EAJA per-

[1] Petitioner also notes (Pet. 11-12, 14) that the Court of Appeals for Veterans Claims has used a local cost-of-living measure, and asserts that the Court of Federal Claims has required the use of the national CPI-U. That is incorrect. The claims court has in fact opted to use *local* inflation figures rather than the CPI-U when put to the choice. See *Cox Constr. Co.* v. *United States*, 17 Cl. Ct. 29, 37 (1989) (rejecting "the use of national CPI figures instead of those for San Diego or Los Angeles," even though the court has nationwide jurisdiction). In any event, any conflict between or within these courts' decisions can be addressed in the first instance by the Federal Circuit, which has jurisdiction over both courts. See 28 U.S.C. 1295(a)(3), 38 U.S.C. 7292 (2000 & Supp. V 2005).

mits or requires reference to local or national inflation statistics. In *Dewalt*, the question was whether "cost of living" could permissibly be measured according to a sub-index of the CPI-U that measures only the national average change in the cost of "personal services," including legal services. See 963 F.2d at 27-28; see also *id.* at 29 ("The narrow issue presented is whether the statute permitted the district court to calculate the 'cost of living' increase solely on the basis of the personal-services component of the consumer price index."). The government argued that the statutory term "cost of living" does not mean "cost of legal services," and proposed as an alternative measure the *local* CPI-U index for southern New Jersey (*i.e.*, not the national average that petitioner urges). See *id.* at 30. The Third Circuit agreed that the "[CPI-U] index, *rather than the personal-services component of that index*, provides *an appropriate measure* of [general] inflation." *Id.* at 30 (emphases added).[2] And the court applied *not* the national CPI-U, but the *local* CPI-U for southern New Jersey. See *id.* at 28, 30.

The Third Circuit expressly agreed with the Fourth Circuit's resolution of a similar question. See *Dewalt*, 963 F.2d at 30. In *Sullivan* v. *Sullivan*, 958 F.2d 574 (4th Cir. 1992), the district court had used the "personal expenses" subcategory of the CPI-U to increase the EAJA cap. *Id.* at 575. "The sole issue on appeal [was] whether the district court abused its discretion in using the 'personal expenses' subcategory" as a measurement of "cost of living." *Id.* at 576. Looking to the text and structure of EAJA, and citing with approval the Fifth

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[2] The Third Circuit used the terms "CPI-U" and "CPI-ALL" interchangeably. See *Dewalt*, 963 F.2d at 28.

Circuit's decision in *Baker*, the Fourth Circuit held that the "personal expenses" subcategory was not a permissible measurement of the "cost of living" for EAJA purposes. See *id.* at 576-578. The court did not consider whether a national index must be used, as petitioner here would have it, or whether a local measure of inflation is permissible or even preferable.

Petitioner also quotes (Pet. 14) a single sentence from the Ninth Circuit's decision in *Thangaraja* v. *Gonzales*, 428 F.3d 870 (2005). That case, too, is inapposite, because it neither addressed nor decided whether EAJA permits or requires the use of a local or national inflation figure. First, the Ninth Circuit was awarding fees under EAJA in the first instance, not reviewing a district court's exercise of discretion to award fees. The court's statement that cost-of-living adjustments using the CPI-U are "[a]ppropriate" certainly does not purport to set the boundaries of permissible discretion. Second, *Thangaraja* relied for this proposition on an earlier case, *Sorenson* v. *Mink*, 239 F.3d 1140 (9th Cir. 2001), in which the court of appeals had held that if the CPI-U is used to measure the cost of living, then the court must use the figures for the year in which legal work is actually performed. *Id.* at 1148-1149.[3] In neither *Thangaraja* nor *Sorenson* did the court of appeals address or analyze whether a national or local measure of inflation was required or even preferable under EAJA. Accordingly, neither case's holding is in conflict with the Fifth Circuit's approach in this case. Cf.

[3] The alternative rejected in *Sorenson*—awarding attorney's fees based on the cost of living in the year a final judgment is rendered, instead of the year the underlying work was performed—was impermissible because it amounted to an unauthorized award of prejudgment interest against the government. See 239 F.3d at 1148-1149.

Sorenson, 239 F.3d at 1149 (noting that "unstated assumptions on non-litigated issues are not precedential holdings binding future decisions") (quoting *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985), cert. denied, 475 U.S. 1081 (1986)).

b. Petitioner also relies on another decision that, as he admits, did not "endorse[] the CPI-U specifically." Pet. 13. In *Johnson* v. *Sullivan*, 919 F.2d 503 (1990), the Eighth Circuit considered a district court's refusal to grant *any* cost-of-living adjustment to the EAJA cap. The court of appeals held that the district court should have granted an adjustment, because Congress intended for the federal courts to take into account the cost of living in setting EAJA awards, as well as "any circumstances that would render a cost-of-living increase unjust or improper" in a particular case. *Id.* at 505.

The *amount* of the adjustment was not controverted in *Johnson*. The government "d[id] not dispute the increase in the cost of living or the method used to prove it." 919 F.2d at 504.[4] The court of appeals did observe that "[u]nder ordinary circumstances * * * the cost of living affects each litigant within a judicial district to the same degree," *id.* at 505; the appellants had noted that their counsel had received a cost-of-living adjustment for similar work from another district judge in the same judicial district, *id.* at 504.[5] The court of appeals closed

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[4] The appellants had submitted some form of CPI data to prove the increase in the cost of living; the court's opinion does not indicate whether the appellant used the CPI-U or another index, and the court noted only that the appellants' proof was "proper." *Johnson*, 919 F.2d at 504.

[5] See also *Hickey* v. *Secretary of HHS*, 923 F.2d 585, 586 (8th Cir. 1991) (remanding an EAJA award for further consideration in light of *Johnson*, "[g]iven *Johnson*'s emphasis on uniformity of hourly rates in

with the observation that "[p]roper proof of an increase in that cost of living [*i.e.*, the cost of living within a judicial district] should result in consistent hourly fee awards in each case, rather than producing disparate fee awards from each court within the district or from different districts within this circuit." *Id.* at 505. Petitioner relies heavily on the brief reference to consistency between districts, but the court's observation was at most dictum. *Johnson* did not present, and the court of appeals did not endorse, petitioner's argument that EAJA requires a nationally uniform cost-of-living standard, or that a district court necessarily abuses its discretion by applying a cost-of-living adjustment that reflects the actual conditions in the division where a case is litigated.

At most, there is tension between the Fifth and Eighth Circuits on a question petitioner does not present: whether cost-of-living adjustments must be uniform within each *judicial district*. The Fifth Circuit requires that cost-of-living adjustments generally be uniform within each *division*, *Yoes* v. *Barnhart*, 467 F.3d 426, 427 (5th Cir. 2006), while the Eighth Circuit's opinion in *Johnson* seems to endorse uniformity within each judicial district—at least to the extent that "the cost of living affects each litigant within a judicial district to the same degree," 919 F.2d at 505. Petitioner argues instead for a *national* cost-of-living measurement, which neither court of appeals has adopted.

There is no circuit conflict on the question presented that calls for resolution by this Court.

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a judicial district and that this case is also from the Eastern District of Arkansas").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 07-547

IN THE

Supreme Court of the United States

OSCAR LOPEZ,

Petitioner,

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

The Commissioner did not gain a proper understanding of the rule of *Baker v. Bowen*, 839 F.2d 1075 (5th Cir. 1988), the basis on which the district court ruled and the Fifth Circuit affirmed below. As a consequence, the Brief in Opposition fails to accurately describe the holdings below and misanalyzes the nature and extent of the conflict among federal jurisdictions as to the proper interpretation of Section 2412(d)(2)(A). In particular, (i) it fails to acknowledge that the same fee application and government response that led the Fifth Circuit to declare $140 a proper inflation-adjusted rate in this case, if filed in the Third, Eighth or Ninth Circuits, would have resulted in an award not less than the $156.25 per hour requested, (ii) it fails to understand that the Fifth Circuit's holding below is squarely in conflict with those of the courts of appeal for the Third, Eighth, and Ninth Circuits, and (iii) it fails to identify the three respects in which the Fifth Circuit rule is simply unique among all federal jurisdictions, even when compared to the only other jurisdictions that adjust the rate cap using exclusively local inflation data.

Holdings of The Courts Below

The Fifth Circuit applies the rule of *Baker v. Bowen*, 839 F.2d 1075 (5th Cir. 1988), to all Social Security rate disputes that come before it. On the ostensible basis that awarding hourly-rates in Social Security cases that are not uniform within each judicial division creates "bewilderment among the bar and litigants," *Baker*, 839 F.2d at 1083, the Fifth Circuit interpreted Section 2412(d)(2)(A) as requiring that all lawyers be paid the same inflation-adjusted hourly

rate for Social Security cases filed in Dallas. The Fifth Circuit has applied the *Baker* rule repeatedly as to numerous other "locales." *See* note 5, *infra.*

Petitioner's fee application in this case was written for the specific purpose of challenging the rule of *Baker*. Mr. Lopez argued below that the national CPI-U, and not conditions in either Dallas or Abilene, should control the cost-of-living adjustment.[1] National CPI-U data attached to Petitioner's fee application was the only inflation evidence presented.[2] The Commissioner did not proffer inflation evidence, did not deny that the national CPI-U is the proper way to calculate "an increase in the cost of living," and did not otherwise oppose Petitioner's request that his lawyers be paid $156.25 per hour.[3] Despite this state of affairs, which the decisions below do not acknowledge, the district court discarded the national-CPI-U-based "cost of living" calculation set forth in Mr. Lopez's fee application, concluding that the court was required to follow the rule of *Baker*. He applied *Baker*'s locale-based rule *sua sponte*, using numerical reasoning that his orders do not disclose. The district court overruled all objections.[4] And, on appeal, the Fifth Circuit affirmed on the basis that the district court properly followed *Baker* and *Yoes*. App. A2. Given the surfeit of Fifth Circuit authority applying *Baker* to EAJA applications in Social Security cases, all of

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[1] Rec. at 169 n.6.

[2] Rec. at 191.

[3] Rec. at 218-223.

[4] App. C2-C3. The district court's order affirming the magistrate does not describe them properly. Compare App.C2 with Rec. at 260-261 and Rec. at 267-271.

which require uniformity within (but not beyond) the "locale" of the court in question,[5] the fact that the decisions below are unpublished is immaterial.

Ignoring *Baker*, Respondent suggests that the magistrate judge found the market rate for Petitioner's counsel to be less than the inflation-adjusted cap, and, therefore, never reached the question of how inflation should be handled. BOI at 5. This is incorrect. It reflects both a misunderstanding of the rule of *Baker* and an implausible interpretation of the magistrate's order. The magistrate's discussion of hourly rate (App. D3-D6) does not mention counsel's experience, ability, work, results achieved, or any of the factors that this Court has identified as determinative of a lawyer's market rate. *See Pierce,* 487 U.S. at 573. Nor did the magistrate consider the "quality of the services furnished" to Petitioner, which the EAJA deems essential to a proper determination of a lawyer's market rate. 28 U.S.C. § 2412(d)(2)(A). The quality of counsel's work in this case and, in particular, the "results achieved" for Mr. Lopez, was shown

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[5] *See Hall v. Shalala*, 50 F.3d 367, 370 (5th Cir. 1995) ("In *Baker*, we held that a determination of the appropriateness of increases based on the cost of living factor and the availability-of-attorneys factor must be uniform among the Dallas district courts. Likewise, these factors should be uniformly applied by the New Orleans district courts."); *Washington v. Barnhart*, 93 Fed.Appx. 630 (5th Cir. 2004) (remanding a fee award with instructions that the Houston court "be cognizant of the need for [hourly rate] uniformity in these types of cases."). *See also Yoes v. Barnhart*, 467 F.3d 426 (5th Cir. 2006) (affirming the Abilene court's previous uniform hourly rate of $132.50 as a proper application of the rule of *Baker*);

to be indisputably high.[6] But the district court did not consider this to be relevant. Nor could it have done so without running afoul of *Baker*, which requires that all lawyers – regardless of their particular qualifications, experience, ability, work, "results achieved" in the particular case, or place of residence – be paid precisely the same rate in every Social Security case filed in the relevant locale (Abilene). Social Security lawyers –ranging from new law-school graduates to the most experienced and accomplished veterans – are fungible under the rule of *Baker* and *must* be paid the same.

The portion of the magistrate's order that explains the hourly-rate finding cites *Baker* eight times. App. D4-D6. Stating that he was required to follow *Baker*, the magistrate judge reconfigured the statute's dual inquiries of market rate and cap adjustment[7] and con-

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[6] The "results achieved" for Mr. Lopez, "the most critical factor" in assessing the reasonableness of a fee, *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1982), was as follows: after receiving Plaintiff's brief but before the agency's brief was due, the Commissioner conceded not only the need for remand, but that Petitioner had been "disabled" since August 25, 1999. DEF.'S BRIEF IN SUPPORT OF UNOPPOSED MOTION FOR REVERSAL AND REMAND at 1. This entitled him to recover seven years of back benefits. Although remands for new hearings are not uncommon, it is truly rare for the agency to concede in federal court that the claimant is definitively "disabled" and has been so for years, notwithstanding numerous prior administrative determinations to the contrary.

[7] *See Meyer v. Sullivan*, 958 F.2d 1029, 1033-34 (11th Cir. 1992) (describing the two-step process for determining the proper hourly rate under the EAJA).

flated them into this single question: what hourly rate to be applied uniformly to all Social Security cases in Abilene will "minimize" costs to the taxpayer, without creating a shortage of lawyers willing to do that kind of work there. It chose $140 as this new "Goldilocks" rate: one not too high, not too low, but intended to perfectly equalize the supply of, and demand for, lawyers willing to handle Social Security appeals in Abilene.[8]

Circuit Split

Whether one focuses on the Fifth Circuit's decision in this case or on the rule of *Baker v. Bowen* that it applies and reaffirms, the existence of a circuit conflict on the question of how inflation adjustments should be calculated could hardly be clearer. It is particularly obvious from any of these three angles:

First, the same fee application and government response that led the Abilene court to award Petitioner

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[8] The rule of *Baker* requires every district court to proceed as though the relevant market for legal services is local, an assumption that has no basis in fact, as this case illustrates. Like many fields of law to which the EAJA applies, the Social Security appellate practice is highly portable. Since the claimant's administrative lawyer usually retains appellate counsel, one rarely travels to meet the client in person. Court appearances are also rare. So once the intricate body of Social Security law is mastered, the research and writing can be done from any office having an internet connection. The final work product can be dispatched for filing by email. So the best Social Security appellate practices tend to be regional or even national in scope. And it is the work of a moment to simply avoid lower paying venues such as Abilene.

$140 per hour in this case would have caused, in fact, it would have compelled, any district court in the Ninth Circuit to award at least $156.25 per hour. All relevant EAJA decisions in the Ninth Circuit have used the national CPI-U to calculate increased cost of living. *See Jawad v. Barnhart*, 370 F.Supp.2d 1077, 1083 (S.D.Cal. 2005) ("... the Ninth Circuit court of appeals and district court cases that apply single source for both CPI-U variables in the formula [for cost-of-living increases set forth in *Sorenson*,[9] all apply the *national* index.") (emphasis in original). Moreover, in at least two such cases from the Ninth Circuit, district courts have entertained specific requests that the local CPI be used. In both instances, these requests were denied on the basis that to use the local CPI would be contrary to Section 2412(d)(2)(A), as the Ninth Circuit had interpreted it. *See Jawad, id.*, and *Stewart v. Sullivan*, 810 F.Supp. 1102, 1107 (D.Haw. 1993) (refusing plaintiff's request that "the Department of Labor's Consumer Price Index (CPI) for Honolulu" be used in calculating the inflation adjustment, because "[i]n all the cases the court has reviewed ... including the cases cited by plaintiff, courts use the national CPI-U, which reflects the cost of living increase for all urban consumers. ... [I]f Congress had wanted to allow for cost of living adjustments in a particular region or city, it could have done so in the statute.")

Second, the court below held that the inflation proof before it, based upon changes in the national CPI-U, was not proper proof of "an increase in the cost of living" under Section 2412(d)(2)(A), even

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[9] *Sorenson v. Mink*, 239 F.3d 1140 (9th Cir.2001).

though the government did not object to it, did not oppose the hourly rate requested, did not propose an alternative inflation-adjustment methodology, and did not proffer inflation evidence of its own. The Fifth Circuit affirmed, holding that the district court did not abuse its discretion in so holding. The Fifth Circuit opinion in this case is directly contrary to cases from at least three other circuits – the Third, Eighth, and Ninth – all of which have held that the national CPI-U is at least "proper proof" of "an increase in the cost of living," if it is not the preferred or only proper proof. In particular, the decision below is directly contrary to *Johnson v. Sullivan*, 919 F.2d 503 (8th Cir. 1990), a case with almost identical facts, but an almost directly opposite holding. *Johnson*, 919 F.2d at 504 (Because the national Consumer Price Index constitutes "proper proof" of an increase in the cost of living, where "[t]he Secretary presented no evidence to suggest that the requested hourly rate was unreasonable, unjustified, or otherwise improper," the district court abused its discretion in failing to grant the requested inflation adjustment). *Johnson* is the case that the Fifth Circuit considered by name and expressly declined to follow in *Yoes*.

The Third Circuit has also "expressly approved the use of the Consumer Price Index in determining cost of living adjustment under the Equal Access to Justice Act." *Allen v. Bowen*, 821 F.2d 963, 967 (3d Cir.1987) (internal citation omitted). And the Ninth Circuit has not only approved the national CPI-U as a proper way to measure an increase in the cost of living under Section 2412(d)(2)(A), but has prescribed use of the national CPI-U as the preferred (and possibly the only proper) proof of inflation in EAJA ap-

plications. *See, e.g., Thangaraja v. Gonzales*, 428 F.3d 870 (9th Cir. 2005) (prescribing a mathematical formula based on the national CPI-U for making cost-of-living adjustments under the EAJA).

Finally, the *Baker* rule for determining hourly rate, which the Fifth Circuit has reaffirmed on at least four prior occasions in the context of requiring rate uniformity in Houston, Dallas, New Orleans, and Abilene,[10] is *unique* among federal jurisdictions in at least these three respects: (i) its insistence that "quality of the [legal] services furnished" to the claimant be disregarded in determining hourly rate, (ii) its insistence that all lawyers handling Social Security cases in a particular locale be paid the same rate there, (iii) its insistence that the "locale" *in which the district court sits* – as opposed to the locale in which the applying attorney principally lives and works – is controlling for both hourly rate and "cost of living" purposes. In the latter respect, the Fifth Circuit is in conflict even with the Veterans Court and the Court of Federal Claims, the only other locale-oriented jurisdictions, which hold that "the actual CPI increase *where the attorney works*" is the relevant issue. *Mannino v. West*, 12 Vet.App. 242, 243 (1999); *see also Cox Const. Co. v. U.S.*, 17 Cl.Ct. 29, 37 (1989).

Language of 2412(d)(2)(A) and *Pierce v. Underwood*

Without mentioning *Pierce v. Underwood*, 487 U.S. 552 (1988), which interprets the provision at issue in this case, the Brief in Opposition argues that "an increase in the cost of living," 28 U.S.C. § 2412(d)(2)(A),

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[10] In addition to this case, *see Baker, Hall, Washington*, and *Yoes*, described *supra* at note 5.

has no plain meaning, but reflects Congress's intention to allow district courts to choose freely among national, regional, or local inflation indexes. But this ignores that the statute says "*the* cost of living." And the inflation-adjustment clause modifies one national rate cap that applies uniformly in every legal market in the land. As one legal scholar has observed:

> The purpose of the rate cap is plainly one of protection of the public fisc. As the Supreme Court observed in *Pierce v. Underwood*, "Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be." Although the cost of living may vary from region to region or city to city, the impact upon the federal treasury of an increase in allowable fee awards against the federal government is the same, whether the federal dollar is paid out to an attorney in New York or in Kansas City. The statutory rate cap is best conceived of as a uniform ceiling upon fee award outlays, so that the impact upon the public fisc remains the same from year to year in constant dollars.[11]

"When Congress created the EAJA in 1980, reenacted it in 1985 and most recently amended it in 1996, Congress had every opportunity to expressly include local or regional language for determining the cost of living adjustment. The fact that Congress did not insert any such language is telling here." *Jawad*, 370

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[11] Prof. Gregory Sisk, "The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)," 56 LA.L.REV. 1, 139-140 (internal citations and notes omitted).

F.Supp.2d at 1085-86 *citing Stewart*, 810 F.Supp. at 1107).

It is not inconceivable that, upon proper findings, exceptional circumstances might warrant departing from using the national CPI-U in a highly unusual case. But that is not this case, which neither of the courts below found to be exceptional. Moreover, the possibility of an exception to the national-CPI-U rule could easily be acknowledged in a decision on the merits and is no reason to deny certiorari.

CONCLUSION

District courts confront requests for inflation adjustments in virtually all EAJA application filed, which surely number in the tens of thousands each year. These should not be difficult to compute or controversial. In *Pierce v. Underwood* this Court said a great deal about what Section 2412(d)(2)(A) means. Although *Pierce* all but blocks the "special factor" path around the rate cap, it seems to invite the case that Mr. Lopez has now brought, which presents the question of what Section 2412(d)(2)(A)'s other exception to the cap means and how it should be proven. A clear answer is needed if the EAJA is to continue to serve its important national purpose.

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